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No. 93-1171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ROBIN R. MOERMAN,

Petitioner,

v.

STATE OF CALIFORNIA, Director of the Department of Fish and Game of the State of California; and DOES I through IX inclusive,

Respondents.

Petition for Writ of Certiorari to the Court of Appeal, State of California, First Appellate District, Division One

BRIEF OF UNITED STATES SENATOR LARRY CRAIG AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND PETITIONER ROBIN R. MOERMAN

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QUESTION PRESENTED FOR REVIEW

When a statutorily protected species invades and damages the private property of a landowner under a governmentally sanctioned relocation program, must the species be shown to be under the complete ownership and control of the government in order to state a claim for taking without just compensation under the Fifth Amendment to the United States Constitution?

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Pursuant to Supreme Court Rule 37, United States Senator Larry Craig submits this brief amicus curiae in support of petitioner Robin R. Moerman. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae Larry Craig is the senior United States Senator from the State of Idaho. He has been a Member of Congress for thirteen years, now beginning his fourth year in the Senate with ten years of prior service in the House of Representatives. Senator Craig is the ranking Republican on the Forestry Subcommittee of the Senate Agriculture Committee, and he also sits on the Energy and Natural Resources Committee. With these committee assignments, amicus encounters national policy with respect to land use and natural resource management on a daily basis.

A significant majority of Senator Craig's home state (almost seventy percent of the total acreage) is owned and controlled by the State of Idaho and United States Government. As such, Idaho is subject to considerable and often oppressive governmental regulation. Indeed, the economic livelihood of many Idahoans engaged in mining, logging and other resource-related industries depend upon a successful relationship with the United States Government. The ranching industry alone accounts for almost $1,000,000 of Idaho's total economic product, and range land itself accounts for over forty percent of the State's total designated land use.

As a United States Senator, Mr. Craig believes he can offer the Court a unique perspective on the petition presently before this Court. Amicus believes that the Constitution's prohibition on the taking without just compensation by the government -- be it *any* government, state or federal -- of private property for public use should be activated when the implementation and enforcement of a species protection program adversely affects private property rights. Amicus has a direct interest in the outcome of this matter because many of Senator Craig's

constituents will be economically affected by the ultimate disposition of this case.

Further, the governmental regulation under examination in the instant petition for certiorari is not qualitatively different in application than the panoply of similar environmental law, including, *inter alia*, the Endangered Species Act, Clean Water Act, and the National Environmental Policy Act, federal legislation which critically affects the ability of individual Idahoans to maintain a viable vocation. As Idaho's senior federal legislator, Senator Craig will be intimately involved in any effort by Congress to address the issues passed on or left unresolved by the Court in this case.

SUMMARY OF ARGUMENT

The petitioner, at present, has been unable to extricate his private property from the ever-tightening choke hold of government. While he enjoyed the sanctity of his private property in Mendocino County, California, the California Department of Fish and Game, the state agency charged with wildlife preservation and enhancement, acted to relocate a herd of tule elk near the petitioner's property. These animals, under the caring and guiding hand of the State of California, have prospered and are now thriving. As the tule elk have flourished, petitioner's private land has proportionately suffered destruction by the physical invasion of this protected species.

The Department of Fish and Game acted under the authority granted by another branch of government -- the legislative branch -- when it executed California Fish and Game Code section 3951. The government's initial intervention and subsequent oversight of efforts aimed at augmenting the tule elk population in California has been rewarded by a significant

increase in the population of the species. But by this successful recovery, the state has not "simply take[n] a single "strand" of [petitioner's] property rights: it [has] chop[ped] through the bundle, taking a slice of every strand." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982). Petitioner's efforts to seek redress from his government bring him before this Court.

This brief amicus curiae will demonstrate that the petitioner's claims are important and warrant scrutiny by this Court.[1] First, an assessment of this Court's jurisprudence under the Fifth Amendment indicates that this matter is particularly suitable for review at this time. The relocation of tule elk by the state of California was a government activity which resulted in a physical invasion of petitioner's private property. Under this Court's principal Takings Clause cases, the petitioner has stated a claim for a physical taking by the government under the Fifth Amendment to the United States Constitution.

Second, the distinction drawn by the court below between a species protected by the government and other physical takings held compensable by this Court in *Loretto* is at worst distinction without difference, or at best an issue yet to be resolved. *Yee v. City of Escondido*, 503 U.S. ___, 112 S.Ct. 1522 (1992), *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989), and *Mountain States Legal Foundation* v. *Hodel*, 799 F.2d 1423 (10th Cir. 1986),

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[1]Rule 10.1(c) makes certiorari review appropriate by this Court "[w]hen a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court or has decided a federal question in a way that conflicts with applicable decisions of this Court." U.S. SUP. CT. R. 10.1(c).

cert. denied, 480 U.S. 951 (1987) have been misconstrued and misapplied by the court below.

The cost of providing a public benefit, specifically, a successful tule elk recovery program, is being borne directly by the petitioner. Such success from a statute enacted by public representatives and implemented by a governmental agency does not "authorize the imposition of [a] direct and peculiar and substantial a burden upon [petitioner's] property without compensation to him." *Armstrong v. United States*, 464 U.S. 40, 49 (1960). When policy is realized through legislation and implementation by the state, the Fifth Amendment requires that a public cost must necessarily follow when the sanctity of a private landholding is violated by that public benefit. The application of this fundamental constitutional tenant is squarely raised by this case, and the petition for certiorari pending before the Court should be granted.

ARGUMENT

I. This Case Presents an Appropriate Issue for Resolution under This Court's Fifth Amendment Takings Clause Jurisprudence.

The Fifth Amendment to the United States Constitution forbids "private property [from] be[ing] taken for public use, without just compensation." U.S. Const. amend. V. But this rudimentary constitutional relationship between the citizens of this nation and their governments[2] has not been evenly

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[2]The Takings Clause of the Fifth Amendment applies equally to a taking by the federal or state government. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

implemented by the judicial branch in the context of environmental regulation. Justice White, in his dissent from denial of certiorari in *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989), offered an appropriate constitutional inquiry.

The Ninth Circuit in *Christy* held that a sheep rancher was not entitled to compensation from the federal government when grizzly bears, a protected species, ate some of his sheep. Because the rancher was not allowed to kill the bear to protect his sheep, he argued that the government had essentially "taken" his property without just compensation. Justice White was clearly distressed by the Ninth Circuit's view of species protection and offered an unopaque example to make his point:

> There can be little doubt that if a federal statute authorized park rangers to come around at night and take petitioner's livestock to feed the bears, such a governmental action would constitute[] a 'taking' ... ."
>
> ...
>
> Thus, if the government decided (in lieu of the food stamp program) to enact a law barring grocery store owners from 'harassing, harming or pursuing' people who wish to take food off grocery store shelves without paying for it, such a law might well be suspect under the Fifth Amendment. For similar reasons, the Endangered Species Act may be suspect as applied in petitioner's case.

Christy, 490 U.S. at 1115-16 (White, J., dissent from denial of certiorari).

Justice White's pronouncement in *Christy* echoes a recent invigoration of the Fifth Amendment as applied to the preservation of property rights. In 1987, this Court decided a

series of property rights cases which provided hope for land owners potentially captured in the vice grip of federal or state environmental law.[3] The most important of those cases was *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). A few years later, an additional application of the Takings Clause was provided in *Lucas v. South Carolina Coastal Council*, ___ U.S. ___ , 112 S.Ct. 2886 (1992).

Nollan squarely presented the issue of what conditions can be placed upon development permits by a state without the exactions becoming an unconstitutional taking of property. The California Coastal Commission, the agency with permitting authority over all development activity on the California coast, demanded dedication by the Nollans of one third of their beach front property as an exaction for a building permit. The Coastal Commission argued that Nollans' home constituted a public "psychological barrier" to the beach.

This Court held that there was no "nexus" or "close fit" between the supposed harms from the development and conditions imposed by the state in exchange for the permit. *Nollan*, 483 U.S. at 836. Significantly, this Court placed its imprimatur on heightened scrutiny in examining the legitimacy of the conditions placed on the proposed development activity. *Nollan*, 483 U.S. at 834 n.3.

In *Lucas*, an owner of beach front property brought suit under the Fifth Amendment to require just compensation after the South Carolina Beachfront Management Act rendered his

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[3]The so-called "1987 Trilogy," in addition to *Nollan*, included *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987) and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

property valueless.[4] After reviewing Fifth Amendment takings jurisprudence, Justice Scalia reiterated that "there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, 112 S.Ct. at 2895 (emphasis in original). In order for the state to avoid having to compensate property owners, a government

> must do more than proffer the legislature's declaration that the uses ... are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*. As we have said, a "State by *ipse dixit*, may not transform private property into public property without compensation...." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that

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[4]Petitioner David Lucas paid $975,000 in 1986 for two residential lots on which he intended to build single-family homes. At the time Lucas obtained the property, the land was not designated as a "critical area" under the South Carolina Coastal Zone Management Act. S.C.Code § 48-39-10 *et seq.* (1987). If certain land was designated "critical area," development activity on that property required a permit from the South Carolina Coastal Council.

The legislation at issue passed *after* Lucas began plans to develop his property. Under authority of the 1988 Beachfront Management Act, the Coastal Council subsequently established a "baseline" connecting the landward-most points of erosion during the last forty years. The latter-established baseline subsumed Lucas' property, and as a result, flatly prohibited, without exceptions, construction of his planned occupiable improvements. *Lucas*, 112 S.Ct. at 2889-90.

> prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.

Lucas, 112 S.Ct. at 2901-02.

Lucas and *Nollan* thus provide hope for those facing the often insuperable burden of environmental regulation. These cases hold that mere invocation of the state's police power is not enough to override the reasonable use expectations of property owners.[5]

This case presents no less an important issue requiring resolution by this Court than did the constitutional questions in *Nollan* and *Lucas*. Whether Robin Moerman and others affected by state wildlife management actions and regulations which extinguish the economic vitality of private property can seek redress under the Fifth Amendment is a logical issue confronting this Court under the Takings Clause.

II. The Court Below Misconstrued this Court's Holdings in *Loretto v. Teleprompter Manhattan CATV Corp.*, and *Yee v. City of Escondido*, and Misapplied Additional Federal Takings Clause Cases.

In rejecting petitioner's Fifth Amendment claim under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S.

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[5]On November 29, 1993, the Court agreed to hear *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993), *cert. granted*, ___ U.S. ___, 114 S.Ct. 544 (U.S. Nov. 29, 1993)(No. 93-518). This important property rights case grapples with the issue of when the Fifth Amendment's prohibition on taking without just compensation will be triggered in a conditional permitting context.

419 (1982), the California appellate court below colloquially recited that "[t]he distinction between tule elk and cable television personnel or equipment should be obvious." *Moerman v. State of California*, 17 Cal.App.4th 452, 457 (Cal.Ct.App. 1993). The court below either too easily distinguished *Loretto* from the matter at bar or relied upon its holding too literally.

The "very narrow" holding of *Loretto* was that "a permanent physical occupation of property is a taking." *Loretto*, 458 U.S. at 442. Here, the petitioner cannot rebut the court of appeals' irrefutable conclusion that an animal is not a cable television box or employee. However, the *legal* similarity between this case and *Loretto* are twofold. First, a state statute in both cases provided the impetus for the physical occupation of private property by a third party instrumentality.[6] Second, the aggrieved property owner in *Loretto*, as in this case, suffered an involuntary physical occupation of private

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[6]The New York statute in *Loretto* made it a crime for a landlord to "interfere with the installation of cable television facilities upon his property or premises." New York Exec.Law § 828 (McKinney Supp. 1981-1982). California's tule elk are a protected species under several state statutes. *See* Cal. Fish & Game Code §§ 332, 3951 (West Supp. 1994). The court below begrudged that "as a practical matter, it may be difficult for [petitioner] to exclude the tule elk from his property without harming them." *Moerman*, 17 Cal.App.4th at 459.

In *Loretto*, "the government authorize[d] the permanent occupation of the landlords property by a third party," specifically, the placement of cable boxes 18" x 12" x 6" by the Teleprompter Corporation. *Loretto*, 458 U.S. at 440. Here, seven hundred pound tule elk, initially transported several hundred miles by the Department of Fish and Game under authority of California Fish and Game Code section 3951, have physically occupied petitioner's property.

property by government-sanctioned third parties.[7]

But these cases differ in one critical respect. In *Loretto*, the government merely authorized the activity of the Teleprompter Corporation to place cable equipment on the private property in question. Here, significantly, the government not only enacted the statute providing for the elk relocation program, but the *government itself* implemented, supervised, and monitored the successful elk breeding program causing the petitioner's damage. Absence of an absolute "ownership" or "control" by the government of the cable boxes in *Loretto* did not render impotent petitioner's Fifth Amendment claim, and the claim presented here is entitled to identical constitutional dignity.[8]

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[7]The Teleprompter Corporation installed cables "slightly less than one-half inch in diameter and of approximately 30 feet in length of the building about 18 inches above the roof top, and directional taps, approximately 4 inches by 4 inches, on the front and rear of the roof ... [with the cable later] extended another 4 to 6 feet ... ," in addition to two large silver boxes." *Loretto*, 458 U.S. at 422. The physical invasion was described by this Court as "minor but permanent," 458 U.S. at 421, but, "[i]n any event ... whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox." *Loretto*, 458 U.S. at 437 n.16.

The record at bar reflects that an initial herd of fifty tule elk tore through petitioner's fences in 1984, Appellants' Appendix at 95, 269 (*see* Petition for Writ of Certiorari at 3 n.1 (hereinafter "AA")); the herd has increased by approximately 15-20 elk per year since, and as many as one hundred individual elk have been observed on petitioner's property at any given time, AA at 95, 269; the elk have persisted in tearing down petitioner's fences and consuming his crops, AA at 95-96, 269-70; and the chronic occupation of petitioner's property has interfered with petitioner's irrigation system by creating potholes and stream bank erosion, AA at 95, 269.

[8]This Court easily dismissed a claim by the City of New York in *Loretto* that the physical invader of private property must be the government itself: "A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the

The court below cited *Yee* v. *City of Escondido*, 503 U.S. ___ , 112 S.Ct. 1522, 1528 (1992), for the proposition that petitioner's claim fails because he has not been ***required*** by the State of California to submit to the physical occupation of his land. *Moerman*, 17 Cal.App.4th at 459. *Yee* taught that the Takings Clause of the Fifth Amendment would be triggered "if considerations such as the purpose of the regulation or the extent to which it deprives the owner of economic use of the property suggest that the regulation has unfairly singled out the property owner ... ." *Yee*, 112 S.Ct. at 1526. An additional lesson is that "the Takings Clause requires compensation if the

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occupant." *Loretto*, 458 U.S. at 432 n.9.

Indeed, the record in the instant matter indicates numerous attempts by the California Department of Fish and Game to exercise dominion and control over the tule elk prospering in Mendocino County. The court below acknowledged that the state anticipated that if the recovery program was successful, management of the species population would be accomplished "through continued monitoring, habitat improvement carried out in cooperation with landowners, sport hunting, and relocation of the elk if necessary." *Moerman*, 17 Cal.App.4th at 458. Additionally, the respondents actually captured and relocated twelve individual elk to another county upon complaint of a landowner. *Moerman*, 17 Cal.App.4th at 458 n.4.

Further, the respondents assisted the petitioner in efforts to scare various elk from his property through the use of helicopters, firecrackers, and guns. Respondents' Appendix (hereinafter "RA") at 63-66. Ear tags and radio collars were attached to certain elk in order to provide information on elk herd migratory patterns and to assist the state monitoring the success of its recovery program. *Moerman*, 17 Cal.App.4th at 458.

Far from indicating that the respondents' post-relocation activity was, as characterized below, "limited," *Moerman*, 17 Cal.App.4th at 458, the record reveals that the government anticipated that deliberate intervention would be an important component of the initial recovery plan and that the Department of Fish and Game continually sought to minimize the effects of its program on private landowners such as the petitioner. Irrespective of success in their efforts, the respondents intended to, and attempted to, "control" the tule elk population in Mendocino County.

government authorizes a compelled physical invasion of property." *Yee*, 112 S.Ct. at 1528.

This Court explained that because the Escondido rent control ordinance, when coupled with the California mobile home residency law,[9] did not compel the prospective takings claimants to rent their property to tenants or to continue doing so, "no government has required any physical invasion of petitioner's property. Petitioner's tenants were invited by petitioner, not forced upon them by the government." *Yee*, 112 S.Ct. at 1528.

But this Court also took great pains to distinguish the factual situation of *Yee* from *Loretto*. Invoking *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987), the key distinction between *Yee* and the successful takings claim under *Loretto* was that "'it is the invitation, not the rent, that makes the difference. The line which separates [*Florida Power*] from *Loretto* is the unambiguous distinction between a ... licensee and an interloper with a government license.' The distinction is equally unambiguous here." *Yee*, 112 S.Ct. at 1531 (quoting *Florida Power*, 480 U.S. at 252-253).

The petitioner has stated a Takings Clause claim under this Court's holding in *Yee*. At no time did the petitioner invite or acquiesce to the presence of elk upon his property. The California Department of Fish and Game was empowered by the state legislature to relocate this protected species, and was

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[9]California Civil Code sections 798 *et seq*. limited the bases upon which a mobile home park owner could terminate a mobile home owner's tenancy, which included, among others, non-payment of rent, the mobile home owners violation of law or park rules, and the park owner's desire to change the use of his land. *Yee*, 112 S.Ct. at 1526.

also granted legislative authority[10] to prevent the elk from "unwanted physical occupation of petitioners' property," *Yee*, 112 S.Ct. at 1531. Because the tule elk are precisely the "interloper[s] with a government license" this Court held decisively significant in *Florida Power* and *Yee*, petitioner's claim requires redress under the Fifth Amendment.

The lower court's grasping of *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989) as a basis for frustrating petitioner's Fifth Amendment claim is similarly in error.[11] There, the Ninth Circuit *specifically refused* to pass on the question presented here for review: "Whether the government may be held responsible for damages caused by ... wild animals that have been relocated by the government, under a theory that such animals are

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[10]The tule elk relocation statute provides that "[w]hen economic or environmental damage occurs, emphasis shall be placed on managing each tule elk herd at a biologically sound level through the use of relocation, sporthunting, or other appropriate means determined by the department [of Fish and Game] after consulting with local owners." Cal.Fish & Game Code § 3951 (West Supp. 1994).

[11]The court below declared that the state of California

> does not own wild animals (*People v. Brady*, (1991) 234 Cal.App.3d 954, 958-959), nor does it control wild animals that have not been reduced to possession (*Christy v. Hodel*, (9th Cir. 1988) 857 F.2d 1324, 1355; *Mountain States Legal Foundation v. Hodel*, (10th Cir. 1986) 799 F.2d 1423, 1426). The majority of courts that have considered whether the government owes compensation for damage to property caused by protected wildlife have held that the government does not. (*See Christy*, at p. 1334, and cases cited therein.)

Moerman, 17 Cal.App.4th at 457-458.

instrumentalities of the government, is a question we do not decide." *Christy*, 857 F.2d at 1335 n.9.

Christy involved a species protected under the Endangered Species Act, the grizzly bear.[12] The plaintiff had lost a total of 84 sheep to bears which had entered land he leased for grazing. After importantly narrowing the issue it was deciding for Fifth Amendment purposes, the Ninth Circuit held that the ESA or its regulations did not "force" the plaintiff to bear any unique burden. "The losses sustained ... are the incidental, and by no means inevitable, result of reasonable regulation in the public interest." *Christy*, 857 F.2d at 1335.

But here, the record is replete with examples indicating that the state knew exploitation of private property was indispensable to the success of the "Management Plan for the Conservation of Tule Elk" (hereinafter "MPCTE"). Over ninety percent of the land included in the Mendocino Tule Elk Management Unit, or "MTEMU," the habitat planned to support the relocation program, is under private ownership. AA at 183-84. Indeed, the government has conceded that the California Legislature factored into their legislation that the relocated elk would "roam from their point of relocation or that they would cause injury to private property." Reporter's Transcript-2 at 41 (hereinafter "RT").

But unlike *Christy*, the damages suffered by the petitioner as the result of governmental regulation cannot merely be pronounced "incidental" or "inevitable." An affirmative act of government induced the events causing petitioner's property damage. Without his knowledge or consent, the California

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[12]16 U.S.C. § 1531 *et seq.* (1988) (hereinafter "ESA"). The grizzly bears had been listed as "threatened" under the ESA and regulations. 50 C.F.R. § 17.11(h)(1987).

Legislature along with the Department of Fish and Game volunteered the property of the petitioner in order to ensure the success of California's elk relocation program. Once the government introduced the elk into the state's stream of ecological commerce, it was not only foreseeable -- *it was planned* -- that petitioner's private property could eventually be converted to public use.[13] The circumstances reviewed by the Ninth Circuit in *Christy* are thus clearly distinguishable from the facts of this case.[14]

The court below also coaxed significance from *Mountain States Legal Foundation* v. *Hodel*, 799 F.2d 1423 (10th Cir.

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[13]*See* Petition for Writ of Certiorari at 5 (describing the MPCTE as evaluating that "[tule] elk can compete with livestock for available forage, cause considerable damage to crops [and] frequently damage fences.").

[14]Land owners and land users faced with oppressive efforts by the government to apply environmental regulation were once heartened by Justice White's view of the outcome of *Christy*:

> [S]ustaining grizzly bears is a worthwhile and important governmental objective. But it is axiomatic that the Fifth Amendment's just compensation is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-319 (1987), quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Here, [petitioner] has been asked to bear the burden of feeding endangered grizzlies -- or at the least, has been estopped from taking measures necessary to prevent the use of his property for this purpose. Thus, it is quite possible that petitioner has been denied the Fifth Amendment's protection against takings.

Christy, 490 U.S. at 1116 (White, J., dissent from denial of certiorari).

1986), *cert. denied*, 480 U.S. 951 (1987) in turning away petitioner's takings claim. At issue in *Mountain States* was the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (1985), which was enacted by Congress to protect wild horses and burros from "capture, branding, harassment, or death." A portion of that statute provided that the federal government would be responsible for removing wild horses or burros straying from public lands onto private property, 16 U.S.C. § 1334, but that any person who "maliciously causes the death or harassment of any wild free-roaming horse or burro" would be subjected to criminal penalties. 16 U.S.C. § 1338(a)(3) (1985).

In *Mountain States*, the Rock Springs, Wyoming Grazing Association claimed that the disregarding by the government of repeated requests to remove the wild animals from private grazing lands constituted a takings claim under the Fifth Amendment.[15] The Tenth Circuit in *Mountain States* brushed aside that argument, concluding that "wild horses and burros are no less 'wild' than are the grizzly bears that roam our national parks and forests." *Mountain States*, 799 F.2d at 1426. In characterizing the regulatory scheme at issue, the Tenth Circuit declared that the "Wild Free-Roaming Horses and Burros Act is nothing more than a *land-use regulation* enacted by Congress to ensure the survival of a particular species of wildlife." Because the Act was "not unique in its

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[15]The Grazing Association claimed that "it is the panoply of management responsibility set forth in the Act and its regulations, including [section 1334], which . . . subject to the United States to liability due to its pervasive control over the horses' existence." *Mountain States*, 799 F.2d at 1426. The wild horses and burros eroded top soil and consumed vast quantities of natural resources on the private property of the associations' membership. *Mountain States*, 799 F.2d at 1425.

impact on private resources owners," the Tenth Circuit turned away the Fifth Amendment claim brought by the plaintiffs. *Mountain States*, 799 F.2d at 1428 (emphasis supplied).

The factual predicate upon which the Tenth Circuit based its holding in *Mountain States* is profoundly distinct from the instant matter. Unlike the private landholders in *Mountain States*, Robin Moerman could not have foreseen that a voracious protected species would one day forage and trample upon his private property. It was only through the course of events set in motion by the enactment of California Government Code sections 332 and 3951, and subsequent implementation by the California Department of Fish and Game, did petitioner's property interest become violated.

And also unlike the activity of the *truly* wild horses and burros at issue in *Mountain States*, the burgeoning tule elk herds in Mendocino, California would not invaded petitioner's property *but for* the state's relocation effort.[16] Indeed, if the

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[16]Particularly disturbing is the lower court's bald conclusion that "[c]learly it is unreasonable to argue that because the [tule elk] were once eliminated from Lake and Mendocino counties and driven to the brink of extinction, that they are now nothing more than a public improvement or pet, under control of the state." *Moerman*, 17 Cal.App.4th at 459.

If it is "obvious" that cable boxes and the people that install them are not tule elk, it is just as indisputable that the year 1994 is not hundreds of years ago when California was blessed with a half-million now-protected individual species. *Moerman*, 17 Cal.App.4th at 458-459 ("Historical reports indicate that at one time there were approximately 500,000 tule elk in this state, inhabiting essentially all oak woodland and oak grassland habitat, including Lake County and eastern Mendocino County."). The court's irrational view of basic historical progress means that any species or natural resource preservation scheme is *de facto* immunized from the Fifth Amendment's Takings Clause where the property owner's interest merely collides with that of the government. The court below, while invoking a virtuous legislative design, has nonetheless disregarded the Fifth Amendment's constitutional function, namely, that compensation to private property owners must be paid

elk breeding program had any chance of success (or if it in fact succeeded), private property would have to have been expropriated in order to ensure the elk a sufficient food source and population habitat.[17] Although California did not air drop the elk directly onto petitioner's property, an identical result was effected by the relocation program. *Mountain States* is clearly distinguishable from the matter pending review here, and the lower court's attempt to analogize the respective instrumentalities of the government as identical in each case is fallacious.

California's tule elk program is precisely the type of government activity which, by any possible calibration, is paradigmatic of a public good. However, "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Loretto*, 458 U.S. at 427.

Fortunately for the People of California and the citizens of the United States, the elk recovery effort in Mendocino County has undoubtedly achieved its public purpose. Unfortunately for the petitioner, he must personally bear the cost of this government activity which has met -- indeed, exceeded -- even reasonable expectations. The Takings Clause precedent below cannot be neglected by this Court.

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if the government engages a balancing of competing land uses and determines to indulge a public purpose at the expense of those property owners.

[17]The California Department of Fish and Game recognized in their MPCTE that "[o]ne positive aspect of livestock grazing is that since water sources are developed by ranchers for their cattle and sheep, permanent water supplies are available year-round for elk and other wildlife." AA at 180.

CONCLUSION

For the foregoing reasons, amicus curiae United States Senator Larry Craig urges this Court to grant the petition for certiorari filed by the petitioner in this case.

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Respectfully submitted,

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